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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

M.L., Plaintiff and Respondent, v. A.G., Defendant and Appellant.	B283532 (Los Angeles County Super. Ct. No. YQ025877)

APPEAL from an order of the Superior Court of Los Angeles County, Patricia J. Titus, Judge. Reversed.

The Law Offices of Jackie Adams and Jackie Adams for Defendant and Appellant.

Milbank, Tweed, Hadley & McCloy, Mark Shinderman, Ashlee N. Lin, Benjamin F. Nicholson; Family Violence Appellate Project, Shuray Ghorishi, Cassandra Allison, Erin C. Smith and Jennafer Dorfman Wagner for Plaintiff and Respondent.

M.L.[1] obtained a restraining order against A.G. under the Domestic Violence Prevention Act (DVPA; Fam. Code,[2] § 6200 et seq.). A.G. claims the trial court (1) abused its discretion by issuing the order absent sufficient evidence of domestic violence and a finding that M.L.'s emotional calm had been destroyed, (2) abused its discretion by extending the scope of the order's protection to include M.L.'s son, and (3) erroneously issued the order for a "standard three years." We hold that insufficient evidence supported the restraining order; therefore, the trial court abused its discretion by granting M.L.'s petition for the order. Accordingly, we reverse the order.

BACKGROUND

I. The Petition

On April 14, 2017, M.L., in pro. per., filed a petition for a domestic violence restraining order against A.G., seeking protection for herself and her 20-year-old son. M.L. stated in the petition, "I feel that if [A.G.] is threatening me my son is also involved because he is going [to] protect his mother." The court issued a temporary restraining order and scheduled a hearing for May 9, 2017.

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[1] On September 14, 2018, M.L. filed a request that we use initials or pseudonyms in this opinion. We grant the request.

[2] Unless otherwise indicated, subsequent statutory references are to the Family Code.

II. The Hearing

A. *M.L.'s Evidence*

1. *M.L.'s Testimony*

At the May 9, 2017 hearing, M.L. testified that in August 2016, her 10-month dating relationship with A.G. ended because his behavior was disturbing and unhealthy. She blocked his phone number and social media access. Despite her threats to obtain a restraining order against him, he refused to leave her alone. She finally wrote to him that his behavior constituted criminal harassment and abuse. He stopped contacting her for a few months.

A.G. later emailed M.L., telling her about a book that made him think of her. When they were dating, they listened to a podcast about a man named Adnan Syed. According to M.L.: "The reason this is important in addition to my warnings that he'd leave me alone is that the subject of the book Mr. Syed is currently in prison for killing his ex-girlfriend who'd broken up with him and refused to accept him back." M.L. believed the email was a covert death threat.

M.L. testified: "My silence doesn't work. My threats of legal action [do not] work and it frightened me to the point [of] . . . taking out a life insurance policy in case something happens to me so that my son can finish college and get a strong start in life without me, and that's why I'm seeking help from the court."

2. *M.L.'s Exhibits*

M.L. proffered copies of three emails and/or email threads as exhibits 1 through 3. Exhibit 1, in pertinent part, reflected the following exchange between M.L. and A.G.: At 9:25 p.m. on November 7, 2016, A.G. wrote: "Just checking to see if you got

the message regarding the check I mailed. Not trying to cause any issues just want to make sure you get the check. Thanks."

At 1:18 p.m. on November 9, 2016, M.L. replied: "I would like to make a formal request that you discontinue your attempts to reach me. And I do NOT want you showing up at my door under your recent guise of being concerned over my welfare since I haven't responded until now. [¶] During our last conversation two months ago, I told you to stop calling me, after which you continued calling via a restricted number. You are doing it again from out of nowhere, and now, in less than 48 hours, you've dialed me 27 times from various numbers including your office . . . . [¶] Most reasonable, healthy people would recognize this entire scenario as intrusive and an invasion of boundaries, especially given 1. it all comes out of nowhere and 2. you're fully aware I've blocked your phone number and any social media connections. [¶] At this point I will be treating this situation as a potential threat to me and to my loved ones."

M.L. advised A.G.: "[M]y preference is to handle this agreement between us vs. initiating a restraining order. But do be aware that your behavior has compelled me to take initial precautions. . . . I have made this situation known to police and to key people around me. If anything happens to me or anyone I love, . . . please be advised that there is a definitive and documented trail that leads to you." M.L. suggested A.G. had tried to "hack" her Facebook account and burglarize her apartment. She also indicated a female had left a voicemail message for M.L., and M.L. believed it pertained to A.G.

At 4:35 p.m., A.G. responded, concerning the Facebook account and alleged attempted burglary: "You are something else! You don't have to worry about me trying to contact you ever

again. I don't need this BS!! I am deleting your information now. You are one sick woman!! The Bi-Polar has really gotten to you!"

At 7:33 p.m., M.L. wrote back: "I am documenting the name[-]calling as part of a consistent volatile behavior pattern." She added: "I've come to see you as a very smart, resourceful, manipulative and dangerous man who will stop at nothing to inflict severe damage on the women who don't give you what you want. Even if it takes years." She suggested A.G. was "going through yet another volatile situation with [another woman, S.B.,]" and that was why he was trying to contact M.L. M.L. stated: "I am not looking to keep this discussion going" and "the apparent threat is known and documented among the people who are on the lookout for my safety and well-being, and that of my loved ones . . . ."

At 8:37 p.m., A.G. wrote that S.B. was simply a close friend. A.G. stated: "I have been very sad and moping since you and I stopped seeing each other." He said he had lost weight, possibly due to his sadness during the last month or so. He "was into [M.L.]," cared for her, but would not contact her anymore. A.G. apologized for saying M.L.'s bipolar condition affected her. He claimed he mentioned it only because she had told him that she was bipolar and he thought it might have caused her accusations.

M.L. responded at 11:51 p.m. that a woman with a bipolar condition had accused A.G. of rape. M.L. accused A.G. of having a " 'thing' with bipolar." She said that to " 'manipulate them, twist their minds up, then call them crazy' appears to be your game." M.L. rejected A.G.'s explanation of his relationship with S.B. M.L. told him: "Dialogue between us clearly doesn't work, and now we have written proof. I will do my part to end it by not opening any further emails from you, so I won't be tempted to

respond." She stated that she wanted to make "a clean break and move on."

A.G. wrote back on November 10, 2016, making multiple references to M.L. being bipolar and opining that they got along fine when she "smoked THC." He told her, "your actions, due to the bipolar, were consistent [with] a person who is paranoid or fixated on an issue that is encountered and not allowing the other person to provide an explanation without being throat punched by you." He said that he would not contact her further.

Exhibit 2 reflected a copy of an email from A.G. to M.L. on December 31, 2016, stating: "Happy New Year! Read if you wish!" M.L. testified that an attachment to the email was "just an apology letter."

On January 5, 2017, M.L. replied that A.G. was sick and his "repeated boundary violations are only reinforcing this belief." She then stated: "As much as you pretend to have good intentions, you're a man who knows the law and that your continuous unwelcome contact is viewed (and now fully documented) as criminally harassing and abusive. I strongly advise you to discontinue this sick behavior, seek professional help, and consider this your final warning to leave me alone." On January 7, 2017, A.G. responded: "Sorry you feel that way. I [said] all I needed to say!! Take care!!!"

Exhibit 3 was a copy of an April 13, 2017 email from A.G. to M.L.: "I was at Barnes and Noble recently and saw the book about Serial Killer Adnon [*sic*]. Upon [seeing the] book I thought of you. I'm just reaching out to say hello. I pray all [is] well."

B. *A.G.'s Testimony*

In his defense, A.G. testified that he was a Los Angeles County probation officer and a police officer in the United States Air Force. On April 18, 2016, his relationship with M.L. "technically" ended. She falsely accused him of calling other women. A.G. and M.L. had a major argument; that was the first time she had ever heard him raise his voice. After May 27, 2016, they spent time together, but they were not going to M.L.'s house "because it's a major argument . . . [in the] presence of her adult son." As a result of M.L.'s constant accusations, he told her she was bipolar. In September 2016, the two agreed to communicate by email.

In November 2016, A.G. reached out to M.L., simply to maintain friendship. In December 2016, he sent her a letter of apology. He mentioned the book referenced in exhibit 3 because she had introduced him to the book; when he saw it, he thought of her.

In response to court questioning, A.G. admitted that he had contacted M.L. after she told him not to contact her. He said he would not contact her again. The court asked: "[W]hy does it take a restraining order when she asked you multiple times not to contact her?" A.G. suggested he was trying to establish a relationship with M.L., but the court told him "[s]he made it clear that she didn't want that." A.G. said, "Yes, she did and because of my personality, I was just trying to maintain a personal [relationship]." A.G. acknowledged, "I shouldn't have . . . ."

C. *M.L.'s Rebuttal Evidence*

In rebuttal, M.L. testified she had an email in which (1) A.G. admitted "that this whole bipolar narrative" is

"attempted covert psychological abuse," and (2) A.G. expressed "remorse for his yelling, for behaving like a male chauvinist." M.L. testified that A.G. had "kind of an alter ego where he would become unrecognizable to [M.L.]. His eyes would bulge from his head and [M.L.] was frightened."[3]

III. The Trial Court's Ruling

On May 9, 2017, the court stated, "I'm going to grant the request for the restraining order. It will be effective for the standard three years through May 9th, 2020."

The court indicated it had considered whether M.L. had clearly communicated "don't bother me" or "don't contact me this relationship is over." The court told A.G.: "You by your own testimony admitted that you did [i.e., contacted her after such communication(s)]. Now you regret doing it, but it seems there were a couple of other times after she made it very clear. You felt the need to get something off your chest and she said she didn't want to hear it and . . . the behavior continued. Apparently the temporary past desire that can't be stopped, but you need to be able to give [M.L.] some type of confidence that the continued

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[3] The trial court did not formally admit into evidence petitioner's exhibits 1 through 3. However, the court marked them for identification during M.L.'s testimony; there was no dispute as to their admissibility and, during A.G.'s testimony, he referred to exhibits 2 and 3. Immediately after M.L.'s rebuttal testimony, the court stated: "Just want to make sure you saw those exhibits," suggesting the court presented them to A.G. The factual summaries in the parties' briefs treat all three exhibits as evidence. Accordingly, we will consider the exhibits as evidence. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 742.)

behavior will remain in the dormant state. Based on what I heard, I am granting the restraining order for three years."

The written restraining order filed on May 9, 2017, stated A.G. must not, inter alia, "[h]arass," "threaten," "molest," or "disturb the peace" of, the protected persons, nor "[c]ontact" them, directly or indirectly, including by telephone, e-mail, or other electronic means. The written order stated it expired on May 9, 2020, and contained a stay away order.

DISCUSSION

I. The Trial Court Abused Its Discretion by Issuing the Restraining Order

A.G. claims the trial court abused its discretion by issuing the restraining order absent sufficient evidence of domestic violence and a finding that M.L.'s emotional calm had been destroyed. We agree the trial court abused its discretion by issuing the order absent sufficient evidence to support it.

A. *Standard of Review and Applicable Law*

We review the issuance of a restraining order under the DVPA for abuse of discretion. (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1143.) "However, '[j]udicial discretion to grant or deny an application for a protective order is not unfettered. The scope of discretion always resides in the particular law being applied by the court, i.e., in the " 'legal principles governing the subject of [the] action . . . .' " ' [Citations.]" (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1264-1265; see also *County of Yolo v. Garcia* (1993) 20 Cal.App.4th 1771, 1778 ["range of judicial discretion is determined by analogy to the rules contained in the

general law and in the specific body or system of law in which the discretionary authority is granted"].)

"In reviewing the evidence, [we] must apply the 'substantial evidence standard of review,' meaning ' "whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted," supporting the trial court's finding. [Citation.] "We must accept as true all evidence . . . tending to establish the correctness of the trial court's findings . . . , resolving every conflict in favor of the judgment." ' " (*Burquet v. Brumbaugh*, *supra*, 223 Cal.App.4th at p. 1143.)

The purpose of the DVPA "is to prevent acts of domestic violence [and] abuse, and . . . to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." (§ 6220.) Section 6211, subdivision (c), defines domestic violence as "abuse perpetrated against" "[a] person with whom the respondent is having or has had a dating . . . relationship." " '[A]buse' " includes "engag[ing] in any behavior that has been or could be enjoined pursuant to Section 6320." (§ 6203, subd. (a)(4).)

Section 6300, subdivision (a), provides in part: "An order may be issued under this part to restrain any person for the purpose specified in Section 6220, if an affidavit or testimony . . . shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." Following notice and a hearing, the court may issue an order "enjoining a party from *molesting, . . . threatening, . . . harassing, telephoning, . . . contacting*, either directly or indirectly, by mail or otherwise, . . . or *disturbing the peace* of the other party." (§ 6320, subd. (a), italics added.) Sections 6203, 6211, 6220, 6300, and 6320 "confer a discretion

designed to be exercised liberally." (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334.)

The DVPA does not define the above italicized terms. (See §§ 6203-6218.) Case law suggests, however, that these terms carry their ordinary meaning. (Cf. *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 338.)

In re Cassandra B. (2004) 125 Cal.App.4th 199 illuminates the meaning of the term "molesting." *Cassandra B.* addressed a restraining order under former Welfare and Institutions Code section 213.5, subdivision (a).[4] (*Cassandra B.*, *supra*, at p. 203.)

The court observed, "as the Supreme Court explained in [*People v. Lopez* (1998) 19 Cal.4th 282], 'molest' does not refer exclusively to sexual misconduct: 'We have observed that the words "annoy" and "molest" in former [Penal Code] section 647a (now section 647.6, subdivision (a)) are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person. [Citations.] As [*People v. Pallares* (1952) 112 Cal.App.2d Supp. 895] observes, "Annoy means to disturb or irritate, especially by continued or repeated acts [citations]; 'to weary or trouble; to irk; to offend; . . . to vex; to molest . . . harm; injure.' (Webster's New Internat. Dict. 2d ed.) [¶] The same dictionary defines 'molest' as, 'to interfere with or meddle with unwarrantably so as to injure or disturb.' Molest is, in general, a synonym for annoy. . . ."

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[4] Former Welfare and Institutions Code section 213.5, subdivision (a), permitted a juvenile court to protect a child by, inter alia, enjoining any person from " 'molesting . . . the child' " or " 'contacting, threatening, or disturbing the peace of the child.' " (*In re Cassandra B.*, *supra,* 125 Cal.App.4th at p. 211.)

[Citation.]' [Citation.]" (*In re Cassandra B.*, *supra*, 125 Cal.App.4th at p. 212.)

Altafulla v. Ervin (2015) 238 Cal.App.4th 571 indirectly defines the term "harass" in section 6320, subdivision (a). In *Altafulla*, the defendant had engaged in an email campaign disparaging the plaintiff to her employer and friends, and the defendant emotionally abused the plaintiff's daughters. (*Id.* at p. 574.) The court stated the defendant's conduct "was alarming, annoying and harassing, served no legitimate purpose, would cause a reasonable person substantial emotional distress, and actually did cause substantial emotional distress. As such, [the defendant's] conduct constituted *harassment* within the meaning of the DVPA . . . ." (*Ibid.*, italics added.)

The phrase " 'disturbing the peace of the other party' " within the meaning of section 6320, subdivision (a), has been defined as "conduct that destroys the mental or emotional calm of the other party." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497.)

B. *Analysis*

M.L. filed her petition for a restraining order on April 14, 2017. Based on her presentation of the evidence, the alleged harassing email exchanges between the parties fell into three buckets: (1) A.G.'s November 7, 2016 email confirming M.L. received the check A.G. mailed her, M.L.'s response to that email asking to be left alone including accusations that A.G. hacked her Facebook account and burglarized her apartment, and five subsequent emails exchanged back and forth between the parties responding to what the other said in the preceding emails; (2) A.G.'s December 31, 2016 "apology letter," M.L.'s response to

it, and A.G.'s reply that he was sorry M.L. felt the way she did and that he had said what he needed to say; and (3) A.G.'s April 13, 2017 email that he saw a book that reminded him of the Serial podcast M.L. and A.G. listened to together, thought of M.L., and was reaching out to say hello and that he hoped all was well with her.

These infrequent clusters of email exchanges, two of which happened four or more months before M.L. sought a restraining order, were insufficient to justify issuance of the restraining order. A.G. originated contact, but it was infrequent and none of his initial emails contained harassing or threatening language. One email was to confirm M.L. received a check, one email was to apologize to her, and the final email was to say he was thinking of her and hoped all was well. To the extent A.G. said more, it was in response to statements by M.L. Based on M.L.'s testimony, she and A.G. had experienced a troubled relationship before it ended in August 2016. Their difficulties apparently spilled over into their subsequent communications. M.L. made accusatory comments in her initial response to A.G.'s November 7, 2016 email, to which M.L. responded in kind as both rehashed their fractious relationship and view of the other's personal failings. M.L. had a similar response to A.G.'s December 31, 2016 apology email, to which A.G. replied only "Sorry you feel that way. I [said] all I need to say! Take care!!!"

Two further aspects of the email exchanges bear mention. First, M.L.'s November 9, 2016 email indicated that A.G. had "dialed [her] 27 times from various numbers including [A.G.'s] office." However, M.L. provided no additional information to support her allegation that A.G. was the person who in fact made these calls. All of these ostensible dialings occurred five months

before M.L. filed her petition, and there is nothing in the record suggesting the trial court credited this allegation when issuing the restraining order. Second, M.L. testified she took the April 13, 2017 thinking of you/hope all is well email as a covert death threat. The trial court never referred to A.G.'s comment about the book that A.G. said precipitated his thinking of M.L., and did not find that that email was in fact a death threat—instead noting only that the email was a further contact by A.G. after M.L. asked to be left alone. Moreover, given M.L.'s testimony that they listened to the Serial podcast together, nothing in the content of the email supports M.L.'s interpretation of it as a death threat.

Certainly, we do not suggest that a DVPA protective order cannot be based on emails, written communications, and/or phone calls alone regardless of their content. To the contrary, the appellate court in *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, stated, "protective orders can be issued because of *persistent* unwanted phone calls or letters—which fall into the same category as 'molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, [or] harassing' the protected party. That *pattern* of unwanted phone calls or letters may support the same set of prohibitions in the initial protective order as one predicated on a series of violent beatings." (*Id.* at pp. 1290-1291, italics added and fn. omitted.) The type of infrequent contact in this case demonstrates no such persistence or pattern. Indeed, the frequency of contact was noticeably tapering between the parties following their breakup in August 2016. There were 11 specifically identified emails between the parties. Seven of them—more than half—were sent in November 2016. The parties had a short exchange (three emails between them) around

New Year's Day 2017, followed by A.G's final thinking of you/hope all is well email in mid-April 2017.

In short, the record does not show substantial evidence of harassing or threatening contact, or that A.G.'s conduct was such that it would destroy the mental or emotional calm of another person, justifying the issuance of a DVPA restraining order.[5] Specifically, we conclude there is no substantial evidence that A.G. (1) "engag[ed] in any behavior that has been or could be enjoined pursuant to Section 6320" within the meaning of section 6203, subdivision (a)(4),[6] or (2) engaged in the behavior described in section 6320, subdivision (a).[7] We therefore hold that there is no substantial evidence of " '[d]omestic violence' " within the meaning of section 6211, subdivision (c), and the trial court abused its discretion by issuing the restraining order.

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[5] In her opening brief, M.L. cites various alleged studies. We decline to consider them because they are not part of the record. (Cf. *People v. Seaton* (2001) 26 Cal.4th 598, 697; *People v. Nicholls* (2008) 159 Cal.App.4th 703, 715.)

[6] Section 6203, subdivision (a), defines " 'abuse' " in four different ways in as many paragraphs. M.L. relies only on one, subdivision (a)(4). M.L. does not argue that A.G. committed " 'abuse' " within the meaning of subdivision (a)(1), (2), or (3).

[7] A.G. argues that abuse must be such that would cause emotional distress to a reasonable person. M.L. disputes this. There is no need to reach the issue. We would reach the same result whether or not a finding of abuse was judged by a reasonable person standard.

II. A.G. Did Not Forfeit His Substantial Evidence Argument.

M.L. claims A.G. forfeited his substantial evidence argument by failing to present fairly in his opening brief all material evidence. We decline to treat the argument as forfeited.

We acknowledge the general rule that an appellant challenging the sufficiency of the evidence to support a finding by the trial court has the burden of demonstrating that there is no substantial evidence to support that finding. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *In re S.C.* (2006) 138 Cal.App.4th 396, 414.) The appellant must set forth all the material evidence, both " 'favorable and unfavorable, and show how and why it is insufficient' " to support the finding. (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738, italics omitted; accord, *In re S.C.*, *supra*, at pp. 414-415.) Additionally, the appellant must support all factual references by citations to the record. (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 599-600.) If the appellant fails to meet this burden, his claim may be deemed forfeited. (*Id.* at p. 599; *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1161-1162.)

M.L. points to instances in which A.G. omitted facts favorable to her, included commentary as facts, and made factual statements unsupported by citations to the record. We acknowledge A.G. did not fully comply with the foregoing principles. However, this failure has not hindered M.L.'s ability to respond to A.G.'s challenge to the sufficiency of the evidence or our ability to review the evidence. Moreover, M.L. concedes that an appellate court's application of the previously mentioned

waiver principle is discretionary. In this instance, we decline to deem A.G.'s challenge to the sufficiency of the evidence forfeited.

DISPOSITION

The restraining order issued on May 9, 2017, is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.